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## MALAYAN BANKING BHD

v.

## DOXPORT TECHNOLOGIES (M) SDN BHD & ORS

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HIGH COURT MALAYA, KUALA LUMPUR
LEE SWEE SENG JC
[SUIT NO: 22NCC-2071-12/2011]
3 OCTOBER 2012

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***CIVIL PROCEDURE:*** *Judgment - Enforcement of judgment - Plaintiff bank granted judgment against defendant borrower and guarantors for defaulting on loan - 80% of plaintiff's loan to borrower to carry out project abroad guaranteed under special government scheme - Whether equity and good conscience demanded plaintiff seek payment of guaranteed sum first before enforcing judgment against defendants*

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In line with the Malaysian government's efforts to encourage local companies to venture abroad, Bank Negara Malaysia had made available RM1billion as a Special Fund for Overseas Project Financing to the Export-Import Bank of Malaysia ('EXIM') to enable EXIM to guarantee a percentage of the financing provided by participating banks for overseas projects. The guarantee scheme was known as the EXIM Overseas Guarantee Facility ('EOGF'). One such participating bank was the plaintiff which had granted USD 3.2m in banking facilities to the first defendant to finance a project in Cambodia. EXIM guaranteed 80% of that sum *ie*, USD 2.56m under the EOGF and the first defendant paid the guarantee fee of 1.5% of the loan amount before the facilities were released to it. The second, third and fourth defendants personally guaranteed the facilities granted to the first defendant. Although the first defendant duly completed the project, payment was not made by the Government of Cambodia causing the first defendant to default in its repayment schedules and the plaintiff to sue all the defendants to recover the amounts owing. *Inter alia*, the first defendant pleaded and argued that in its discussions with the plaintiff's officer the latter had led the defendants to believe that because of the existence of the EOGF the defendants would not be sued if the Government of Cambodia failed to honour its obligations to the first defendant.

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**Held (allowing the claim with costs but barring the plaintiff from executing on the EXIM guaranteed sum of USD 2.56m until after the plaintiff had exhausted its legal remedies against EXIM unless limitation would set in for the enforcement of the judgment against the defendants):**

**(1)** There was a social and public element to the special brand and breed of guarantee facility in the form of the EOGF. The demands of equity and good conscience constrained the court to order that though judgment be entered against the defendants, that much which EXIM had guaranteed to pay the plaintiff should be enforced against EXIM before the plaintiff could proceed with enforcement of that part of the judgment against the defendants. (para 47)

**(2)** The court took into consideration the fact that default was not because of anything but the non payment by the Government of Cambodia for the works duly executed by the first defendant. The whole purpose of the EXIM Guarantee was to cater for such a situation. The loan would not have been given by the plaintiff had it not been for the availability of the EOGF to obtain which the guarantee fee had been paid by the first defendant. (para 48)

**(3)** The defendants failed to prove on balance of probabilities the issue of misrepresentation. The documentary evidence was at variance with the alleged oral misrepresentation and vitiated the latter. The clear terms in cl. 20.4 of the Facilities Agreement ('FA') and cl. 7A of the Personal Guarantee sterilised, neutralised and expunged whatever oral statements were made by the plaintiff's officer that the plaintiff would not sue the defendants if the Government of Cambodia failed to fulfill its obligations and that the EXIM Guarantee would take care of all political risks. (paras 29 & 37)

**(4)** By accepting and signing voluntarily and freely the First Letter of Offer, the FA and other loan documentation, the first defendant was bound by the contractual terms signed therein. It was now not open for it to argue that it was misled into accepting those documents as it was advised to obtain independent legal advice prior to accepting them. (para 31-32 & 34)

A **(5)** The court accepted the Statement of Amount Due & Owing/ Certificate of Indebtedness as conclusively proving the defendants' indebtedness to the plaintiff as claimed in the statement of claim as no evidence was led to show there was any manifest error in the Statement/Certificate. (paras 17 &
B 21).

**Case(s) referred to:**

*Ainsbury v. Millington [1987] 1 All ER 929* ***(refd)***

*Cempaka Finance Bhd v. Ho Lai Ying & Anor [2006] 3 CLJ 544 FC* ***(refd)***

*Central Bank of India v. Hartford Fire Insurance Co Ltd [1965] AIR SC*
C *1288* ***(refd)***

*Chai Then Song v. Malayan United Finance Bhd [1993] 2 CLJ 640 HC* ***(refd)***

*China and South Sea Bank Ltd v. Tan [1989] 3 All ER 839* ***(refd)***

*Datuk Syed Kechik Syed Mohamed & Anor v. The Board of Trustees of the*
D *Sabah Foundation & Ors [1999] 1 CLJ 325 FC* ***(refd)***

*L' Estrange v. F Graucob Ltd [1934] 2 KB 394* ***(refd)***

*Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 2 CLJ 36 SC* ***(refd)***

*Janagi v. Ong Boon Kiat [1971] 1 LNS 42 HC* ***(refd)***

*Juahir Sadikon v. Perbadanan Kemajuan Ekonomi Negeri Johor*
*[1996] 4 CLJ 1 CA* ***(refd)***
E

*Malayan Banking Berhad v. Omar Khayam Hotel & Restaurant Sdn Bhd &*
*Ors [2010] 1 LNS 1593 HC* ***(refd)***

*Mulpha Pacific Sdn Bhd v. Paramount Corporation Bhd [2003] 4 CLJ 294*
*CA* ***(refd)***

*Tan Chong Keat v. Pengurusan Danaharta Nasional Bhd [2008] 4 CLJ 748*
F *CA* ***(refd)***

*Wee Lian Construction Sdn Bhd v. Ingersoll-Jati Malaysia Sdn Bhd [2010]*
*4 CLJ 203 CA* ***(refd)***

*Yew Wan Leong v. Lai Kok Chye [1990] 1 CLJ 1113; [1990] 1 CLJ (Rep)*
*330 SC* ***(refd)***

G **Legislation referred to:**

Evidence Act 1950, s. 103

*For the plaintiff - Himahlini Ramalingam (Yvonne Chang Ee Wan with her); M/s Lee Hishammuddin Allen & Gledhill*

*For the defendants - Manmohan Singh Kang; M/s Kang & Kang*
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*Reported by Ashok Kumar*

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## JUDGMENT

**Lee Swee Seng JC:**

### Prologue

**[1]** The 1st plaintiff had a project in Cambodia, a third world country. It was deemed to be a high political risk country. However the Malaysian government has been encouraging local companies to venture overseas. Through the instrumentality of Bank Negara Malaysia ("BNM"), funds to the tune of RM1 billion was made available to Export-Import Bank of Malaysia ("EXIM"). It is known as the special fund for Overseas Project Financing. EXIM is thus able to grant the EXIM Overseas Guarantee Facility ("EOGF") to local participating banks in respect of the financing to be provided by these banks for overseas contracts and projects and to guarantee the banks a certain guarantee percentage. All these arrangements are spelt out in a loan agreement dated 26 June 2006 between BNM and EXIM wherein BNM has appointed EXIM to manage and administer the special fund for Overseas Project Financing.

### Parties

**[2]** The 1st defendant applied to the plaintiff to finance a contract known as Secure Civil Service System (SCSS) Project for the Kingdom of Cambodia ("the project"). The plaintiff had on 11 December 2006 become a participating bank when it entered into the EXIM Overseas Guarantee Facility Agreement with EXIM (bundle D pp. 1-33). From the outset the plaintiff made it clear to the 1st defendant that it would not approve the banking facilities in view of the high political risks surrounding the project and that it would require the EXIM Guarantee as one of the securities. In fact the plaintiff through its witness PW1 informed the 1st defendant of the EOGF that was available.

**[3]** The 1st defendant agreed to apply for financing under the EOGF and allowed the plaintiff to submit information regarding the 1st defendant's account to EXIM (bundle D at p. 34).

**[4]** By two Letters of Offer dated 5 November 2007 (bundle D pp. 35-46) and 15 November 2007 (bundle D pp. 47-48), the plaintiff granted the 1st defendant banking facilities consisting of a Short-Term Revolving Credit Facility for USD 1.2 million (STRC

A Facility) and a term facility for USD 2.0 million (Term Loan 1 Facility) subject to EXIM Bank approving the 1st defendant's letter of guarantee under the EOGF.

**[5]** As part of the securities required by the plaintiff, the 2nd, B 3rd and 4th defendants executed a joint and several guarantee for RM11.2 million (the Personal Guarantee).

**Problem**

**[6]** The complete securities required by the plaintiff consisted of C the following:

(a) Facilities Agreement

(b) Fresh Contract Assignment together with Notice of Assignment Cum Instruction ("NACI") to channel contract D proceeds to the 1st defendant's collection account to be issued by the 1st defendant and acknowledged by the council for Administrative Reform, Kingdom of Cambodia

(c) Letter of Guarantee from EXIM Bank for 80% of the facility E amount (USD 3.2 million x 80%) = USD 2.56 million

(d) A fresh joint and several guarantee by the 2nd, 3rd and 4th defendants for RM11.2 million

(e) Retention of 65% of all contract payment received to be F emplaced under sinking fund

(f) Assignment of Political Risk Insurance Policy.

**[7]** The 1st defendant duly accepted the two Letters of Offer G on 14 November 2007 (1st letter of offer) and 16 November 2007 (2nd letter of offer) (bundle D pp. 38 and 48 respectively).

**[8]** On 27 December 2007, EXIM Bank granted the EOGF amounting to USD2.56 million (bundle D pp. 76-81). The opening H words of the said EOGF in its letter to the plaintiff reads:

> We are pleased to inform that your request for EXIM Overseas Guarantee Facility against an STRC and LC/TLWUAN facility of USD2,560,000.00 in favour of Doxport Technologies (M) Sdn Bhd (61215-M) has been approved subject but not limited to the I following terms and conditions: ...

**[9]** At the 1st defendant's request, the STRC Facility was subsequently restructured and converted into a Term Loan 2 Facility.

**[10]** The 1st defendant completed the project but payment was not forthcoming from the Government of Cambodia. The 1st defendant defaulted in the repayment schedules and the plaintiff sued all the defendants to recover the amount owing to it.

**Prayers**

**[11]** The plaintiff's claim against the 1st defendant is for the sum of USD 3,469,428.04 (equivalent to RM12,142,998.15) (exchange rate USD 1.00: RM3.50) together with interest accruing thereon at the date of 2% per annum (inclusive of additional interest of 1% per annum) above the plaintiff's cost of funds, on monthly rests from 1 November 2011 until the date of full payment, as prayed for in the statement of claim and costs.

**[12]** The plaintiff's claim against the 2nd, 3rd and 4th defendants is for RM11.2 million together with interest accruing thereon at the rate of 2% per annum (inclusive of additional interest of 1% per annum) above the plaintiff's cost of funds, on monthly rests from 1 November 2011 until the date of full payment, as prayed for in the statement of claim and costs.

**[13]** The list of the plaintiff's costs of funds is set bundle E at p. 59.

**Preliminaries**

**[14]** The plaintiff called two witnesses:

(a) Puan Rosni binti Alighor (PW1), the plaintiff's officer who was the officer supervising the banking facilities granted to the 1st defendant from July 2007 until October 2009; and

(b) Puan Sharifah Rehana bt Syed Osman (PW2), the plaintiff's officer who is supervising the recovery of the amount owing.

**[15]** The defendants called two witnesses:

(a) Mr. Sivalingam a/l Thechinamoorthy (DW1), the 2nd defendant who is also a director of the 1st defendant; and

(b) Dato Seri Abdul Azim bin Mohd Zabidi (DW2), the 4th defendant, who is also a director of the 1st defendant.

**[16]** The documents filed were marked as follows:

(a) Amended Bundle of Pleadings – A

(b) Statement of Agreed Facts – B

(c) Statement of Issues to be Tried – C

(d) Common Bundle of Documents (vol. 1) Part B – D

(e) Common Bundle of Documents (vol. 2) Part B – E

**[17]** The plaintiff produced a Statement of Amount Due & Owing/Certificate of Indebtedness which details the amount due and owing by the 1st defendant as at 31 October 2011. The 1st defendant had agreed that such a statement, commonly known as a certificate of indebtedness, is final and conclusive evidence. The 2nd, 3rd and 4th defendants have also agreed that such a statement is final and conclusive evidence.

**[18]** DW2 in cross-examination confirmed that the 1st defendant enjoyed the banking facilities amounting to USD 3.2 million and that sum together with interests accruing thereon remains unpaid until todate. The interest rate imposed on the Term Loan 1 and Term 2 Facilities are clearly spelt out in the plaintiff's Letter of Offers dated 1 July 2008, Facility Agreement dated 3 January 2008 and 5 November 2007 wherein:

(a) The interest rate is calculated at cost of funds + 1% per annum on monthly rests;

(b) Additional interest of 1% per annum shall be imposed on any late payment.

**[19]** There is no evidence led by the defendants which shows that there is any manifest error in the Statement of Amount Due & Owing/Certificate of Indebtedness.

**[20]** In *Tan Chong Keat v. Pengurusan Danaharta Nasional Bhd* [2008] 4 CLJ 748, the Court of Appeal held at pp. 754-755:

> Although in para 1 of his defence, the appellant stated, to use the pleader's words; "the plaintiff's claim is incorrect and does not specify the exact amount claimed, less whatever payments made", nowhere in the pleading is to be found an assertion that the certificate of indebtedness was bad for manifest error. Further,

> nowhere in the defence have there been any particulars pleaded, disclosing the nature of the alleged manifest error. In the face of this glaring omission, the learned judge cannot be faulted for failing to deal with the point. *A plea of manifest error is a special plea, and in accordance with O. 18 r. 12 of the Rules of the High Court 1980 must be expressly taken. A plaintiff who relies on an account stated or certificate of indebtedness is entitled, as a matter of natural justice, to know the grounds on which the account or certificate, as the case may be is challenged on substantial grounds admissible in law.* In our judgment, since the point is not properly taken by the appellant, it is not open to him now to raise this in his argument in support of his appeal. (emphasis added)

**[21]** In the absence of evidence to the contrary this court accepts the Statement of Amount Due & Owing/Certificate of Indebtedness as conclusively proving the defendants' indebtedness to the plaintiff as claimed in the statement of claim. See *Cempaka Finance Bhd v. Ho Lai Ying & Anor* [2006] 3 CLJ 544, FC

*Whether The Plaintiff Had Misrepresented To The Defendants On The True Nature Of The EXIM Guarantee*

**[22]** The 1st defendant pleaded at para. 15A.6 that the 1st defendant had several discussions with the plaintiff and the plaintiff had given the picture that with the EXIM Guarantee in place under the EOGF, the defendants will not suffer any risks if the Government of Cambodia should fail to fulfill its obligations to pay the 1st defendant. The crux of the allegation of misrepresentation was that the defendants were led to believe by the plaintiff that as it had the EXIM Guarantee, the plaintiff would not sue the defendants in the event the Government of Cambodia should fail to fulfill its obligations. The political risks would be covered by the EXIM Guarantee.

**[23]** The burden of proving that the defendants were induced due to misrepresentation to execute the Letters of Offer, Facility Agreement and Personal Guarantee in respect of the banking facilities lies with the defendants. See s. 103 Evidence Act 1950 and the case of *Juahir Sadikon v. Perbadanan Kemajuan Ekonomi Negeri Johor* [1996] 4 CLJ 1 CA.

**[24]** PW1 during cross-examination firmly denied that she had at any time represented to the 1st defendant that with the EXIM Guarantee, the plaintiff would not sue the defendant in the event

A the Government of Cambodia should fail to fulfill its obligations. The First Letter of Offer and/or in any other documentation relating to the banking facilities granted to the 1st defendant, do not contain any such representation.

B **[25]** More than that the 1st defendant is accepting the First Letter of Offer clearly acknowledged in bundle D at p. 38 that:

> (1) Subject to the terms and conditions of the legal documentation to be executed, *I/We further agree that this letter embodies in writing all and the entire terms of our agreement and*
C *I/We hereby declare and confirm that no warranties, promises, representations, collateral agreements have been made to me/us and if, which is denied, that any such warranties, promises, representations or collateral agreements were made they have now lapsed and are superseded by this letter and be of no effect*
D *whatsoever.* (emphasis added)
>
> (2) I/we hereby *acknowledged that I/we have read and understood the contents of this letter and I/we further warrant that I/we have sought independent legal advice in relation to this letter and acknowledge the obligations arising from.* (emphasis added)

E **[26]** I agree with learned counsel for the plaintiff, Miss R Himahlini that if it was true that PW1 had as alleged misrepresented to the defendants that they would not be sued as the EXIM Guarantee would cover all political risks, the first Letter
F of Offer would certainly say so. The guarantors are no novice in the business of borrowing and indeed that the 4th defendant was the Chairman of Bank Simpanan Nasional from 1999 to 2008.

**[27]** The first letter of offer forms part of the Facilities Agreement dated 3 January 2008 ("FA") and cl. 20.4 of the FA clearly
G stipulates:

> **20.4 Concurrent Proceedings**
>
> Notwithstanding any provision hereof, it is hereby expressly agreed that upon default or breach by the Borrower of any term,
H covenant, stipulation and/or undertaking provided under any Transaction Documents and on the part of the Borrower to be observed and performed, *the Lender shall thereafter have the right to exercise all or any remedies available whether by the Transaction Documents or by statute or otherwise and shall be entitled to exercise such*
I *remedies concurrently to recover all monies due and owing to the Lender*

*PROVIDED THAT nothing herein contained shall be construed as imposing any obligations (whether at law or in equity) upon the Lender to exhaust its remedy to sell the charged property under the Transaction Documents before commencing any separate action or enforcing any other remedies or exercising any other rights which the Lender may have against the Borrower or any other Security Party simultaneously or consecutively in any order as the Lender deems fit* with or without having exhausted its rights to sell or to proceed against the said charged property or to realize its security hereunder. (emphasis added)

**[28]** There is also a similar clause in cl. 7A of the Personal Guarantee, where the 2nd, 3rd and 4th defendants agreed that:

7A You shall have the right to exercise all or any of the remedies available whether by this Guarantee or by statute or otherwise and shall be entitled to exercise such remedies concurrently, including pursuing all remedies pursuant to this Guarantee and civil suit against the Customer or other security party to recover all moneys due and owing to you, *PROVIDED THAT nothing herein contained shall be construed as imposing any obligation (whether at law or in equity) upon you to exhaust your remedy to enforce any of the securities or against any other security party before commencing any action against us AND we hereby irrevocably and unconditionally agree and consent to you commencing separate proceedings, enforcing other remedies and exercising any other rights which you may have against us., the Customer or any other security party simultaneously or consecutively in order as you deem fit* (emphasis added)

**[29]** Even assuming for a moment that there was such a misrepresentation (which is not the finding of this court) the clear terms in cl. 20.4 of the FA and cl. 7A of the Personal Guarantee would have sterilized, neutralized and expunged whatever oral statements made by PW1 to them that the plaintiff will not sue them should the Government of Cambodia fail to fulfill its obligations and that the EXIM Guarantee would take care of all political risks. I agree with the plaintiff's submission that by these written terms, the plaintiff clearly and unequivocally reserved its rights to pursue all securities it holds whether concurrently or consecutively against the defendants.

**[30]** The logic of the argument becomes even more clear and compelling when one considers that the EXIM Guarantee was only for 80% of the total banking facilities granted to the 1st defendant. The EXIM Guarantee could not have covered all political risks in any event.

A **[31]** By accepting the First Letter of Offer and the FA, the 1st defendant is bound by the contractual terms signed therein. See the cases of *L' Estrange v. F Graucob Ltd* [1934] 2 KB 394 and *Wee Lian Construction Sdn Bhd v. Ingersoll-Jati Malaysia Sdn Bhd* [2010] 4 CLJ 203, CA.

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**[32]** In both the First Letter of Offer and the FA, the 1st defendant was asked to obtain independent legal advice. DW1 in cross-examination admitted that the 1st defendant did not obtain independent legal advice prior to accepting the First Letter of
C Offer and the FA although it was advised to do so. If that be the case, they only have themselves to blame. At any rate, DW1 further admitted that the 1st defendant signed voluntarily and freely the First Letter of Offer and the FA and any other loan documentation.

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**[33]** The background of the personalities behind this project must be borne in mind when determining whether the defendants could have been misled as to the consequences following a default in payment of the facilities. The 2nd defendant is a season
E businessman who started the 1st defendant in the year 2002 and the 4th defendant is an experienced banker having been the former Chairman of Bank Simpanan Nasional who guided the 1st defendant into venturing into Cambodia. Both the 2nd and 4th defendants executed the 1st defendant's directors' resolution
F accepting the First Letter of Offer. Both the 2nd and 4th defendants are men of commerce with knowledge of the business world and are not just merely the common man on the street. In fact DW1 in cross-examination admitted that he went online to the EXIM Bank website and filled in and submitted the 1st defendant's application form for the EOGF.

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**[34]** I agree with Miss Himahlini for the plaintiff that it is now not open for the 1st defendant to argue that it was misled into accepting the First Letter of Offer, the FA and the other loan documentation relating to banking facilities granted to the 1st
H defendant despite being put on notice to obtain independent legal advice. See the cases of *Malayan Banking Bhd v. Omar Khayam Hotel & Restaurant Sdn Bhd & Ors* [2010] 1 LNS 1593 HC, and *Chai Then Song v. Malayan United Finance Bhd* [1993] 2 CLJ 640.

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**[35]** The 1st defendant is bound by the four corners of the First Letter of Offer and the FA and all documentation executed by it relating to its banking facilities and it is axiomatic that a court of law has to give effect to the bargain of parties. In *Central Bank of India v. Hartford Fire Insurance Co Ltd* [1965] AIR SC 1288, the Supreme Court of India held:

> … Now it is commonplace that it is the court's duty to give effect to the bargain of parties according to their intention and when that bargain is in writing the intention is to be looked for in the words used unless they are such that one may suspect that they do not convey the intention correctly. *If those words are clear, there is very little that the court has to do. The court must give effect to the plain meaning of the words however it may dislike the result …*
>
> … We also think that plain and categorical language cannot be radically changed by relying upon the surrounding circumstances; a right to terminate at will cannot by reason of the circumstances, be read as a right to terminate for a reasonable cause." (emphasis added)

**[36]** This *Central Bank of India* case was cited with approval and adopted by the Court of Appeal in *Mulpha Pacific Sdn Bhd v. Paramount Corporation Bhd* [2003] 4 CLJ 294.

**[37]** I held that the defendants had failed to prove on a balance of probabilities the issue of misrepresentation. The documentary evidence before this court is at variance with the alleged oral misrepresentation and indeed would vitiate such an oral misrepresentation even if assuming for a moment that there had been one.

**[38]** With respect to the liability of the guarantors under the personal guarantee, there is no doubt that the proper demands have been made. DW1 had also in cross-examination conceded that he was informed that even with the EXIM Guarantee, Deed of Assignment of Insurance and other securities held by the plaintiff, he could still be sued by the plaintiff under the Personal Guarantee for the recovery of the 1st defendant's indebtedness. DW2 had also in cross-examination conceded that because of the Personal Guarantee he executed, the plaintiff is entitled to sue him for the recovery of the amount owed by the 1st defendant.

**[39]** I held that the guarantors in 2nd to the 4th defendants here under the Personal Guarantee executed are liable to the limit of the amount guaranteed as claimed.

*Whether The Issue Of Subrogation Is Relevant In The Plaintiff's Claim Against The Defendants*

**[40]** To begin with the defendants have not pleaded the issue of subrogation in their amended defence and are bound by their pleadings.

**[41]** See the cases of *Janagi v. Ong Boon Kiat* [1971] 1 LNS 42; *Yew Wan Leong v. Lai Kok Chye* [1990] 1 CLJ 1113; [1990] 1 CLJ (Rep) 330.

**[42]** What had transpired in the proceedings was that when PW1 was cross-examined on whether to she understood the term 'subrogation' as found in cl. 14 of the EOGFA dated 11 December 2006 between the plaintiff and EXIM Bank, she answered she did not. All that cl. 14 says is this:

> 14.1 Upon claims payment being made pursuant to Clause 12.3 hereof, **if required by EXIM, the PFI shall subrogate** all the PFI's rights and powers under the Financing to EXIM, including the PFI's rights against the PFI's Clients. (emphasis added)

**[43]** Clause 12.3 provides as follows:

> Payment by EXIM to the PFI of the claims made by the PFI shall be made not later than two (2) months from the date EXIM receives the claim submission form as prescribed by EXIM, together with the requisite and complete information and provided that the PFI has complied with its internal collection and recovery procedures as provided in item 6 of Appendix 1.

**[44]** By "PFI" is meant Participating Financial Institution and in the EOGFA it refers to the plaintiff.

**[45]** PW2 in cross-examination confirmed that the 1st defendant's account with the plaintiff was not subrogated. DW1 and DW2 during cross-examination both admitted that the 1st defendant's account was not subrogated to EXIM Bank. There is thus no dispute on the issue of subrogation upon which this court has to adjudicate upon, at least not at this stage. It is trite law that a court of law will not adjudicate on hypothetical questions or issues

as it does not pronounce on abstract questions of law when there is no dispute to be resolved. It does not trouble itself with trifles and trivias. See the cases of *Ainsbury v. Millington* [1987] 1 All ER 929 (HL) and *Datuk Syed Kechik Syed Mohamed & Anor v. The Board of Trustees of the Sabah Foundation & Ors* [1999] 1 CLJ 325.

*Whether The Plaintiff Can Exhaust Its Remedy Against The Defendants Before Exhausting Its Remedy Against EXIM Bank*

**[46]** It is undisputed that the EXIM Guarantee is just one of many securities obtained by the plaintiff to protect its interests. This court noted that whilst that may be so, the guarantee fee of some 1.5% per annum was paid by the 1st defendant. It was a condition set out in "PRE-DISBURESEMENT CONDITIONS (vii) Guarantee Fee of RM1.50% of the loan amount to EXIM Bank to be borne by the borrower and to be paid before the release of facilities." After some rebate of 20% the net guarantee fee payable still amounted to USD51,840. It is not for nothing when the 1st defendant had to incur further costs in procuring the EXIM Bank Guarantee. It is also agreed that if not for the EXIM Guarantee the plaintiff would not have granted the facility. Whilst generally the plaintiff is entitled in law to enforce all or any of the securities it holds whether concurrently or consecutively - *China and South Sea Bank Ltd v. Tan* [1989] 3 All ER 839, *Low Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 2 CLJ 36; there would be circumstances where the defendants can assert that the plaintiff should exhaust its remedy against in this case EXIM Bank, appointed as it is by BNM, to encourage local companies to venture abroad in countries of high political and to guarantee the participating financial institutions at the guaranteed percentage. As adduced in evidence and rightly pointed out by learned counsel for the defendants Mr Manmohan Singh Kang both in EXIM Bank webpage and in the recital to the EOGFA between EXIM Bank and the plaintiff, the avowed altruistic aim of the EXIM EOGF could not be clearer. Recital (A) of the EOGFA in bundle D at p. 2 is set our below for all the consider and appreciate:

> By the loan agreement dated 26 June 2006 between Bank Negara Malaysia (hereinafter referred to as "BNM") as lender and EXIM as borrower, **to support the Government's strategy in encouraging Malaysian companies to venture abroad**, BNM had agreed to lend to EXIM a sum of not exceeding the principal

A amount of Ringgit Malaysia One Billion (RM1,000,000,000) only known as the Special Fund for Overseas Project Financing (hereinafter referred to as "BNM Facility") to enable EXIM amongst others to **grant the EXIM Overseas Guarantee Facility ("EOGF") to the participating financial institutions** of up to the EOGF Facility Limit (as defined below) in respect of the financing to be provided by the participating financial institutions for overseas contracts and projects and to *guarantee the participating financial institutions at the Guaranteed Percentage* (as defined below) of the PFI's Loss (as defined below) but limited to EXIM's Maximum Liability Limit (as defined below). (emphasis added)

**[47]** There is thus a social and public element to this special brand and breed of guarantee facility in the form of EOGF. The demands of equity and good conscience would constrain this court to make an order that though judgment be entered against the defendants, that much which EXIM has guaranteed to pay to the plaintiff in the event of default of this nature, should be enforced against EXIM Bank before the plaintiff can proceed with enforcement of that part of the judgment against the defendants herein.

**[48]** The court also takes into consideration the fact that the default was not because of anything but the non payment by the Government of Cambodia for the works duly executed by the 1st defendant. The whole purpose of the EXIM Guarantee is to cater for a situation such as this. It is to be noted that the loan would not have been given had it not been for the availability of this EOGF Guarantee which guarantee fee has been paid by the 1st defendant.

**[49]** I do realize that provision has to be made such that the plaintiff would be entitled to proceed with enforcement of that part of the judgment if by not doing so, limitation would set in.

**Pronouncement**

**[50]** In the circumstance the court had granted judgment as prayed for by the plaintiff against the defendants jointly and severally for the respective amounts against the 1st defendant as borrower and the 2nd to 4th defendants as guarantors and where costs of funds is concerned parties shall have regard to p. 59 of bundle E which shall be set out in the judgment extracted

PROVIDED ALWAYS THAT the plaintiff shall not execute on the sum of USD 2.56 million (which is the amount of guarantee from EXIM Bank to the plaintiff) until after the plaintiff has exhausted its legal remedies against EXIM Bank unless limitation would set in for the enforcement of this judgment against the defendants.

**[51]** For purposes of this judgment and its enforcement the exchange rate is fixed for USD 1 = RM3.50 by contract (bundle D at p. 35).

**[52]** As for costs, after hearing both sides, this court had fixed it at RM30,000 to be paid by defendants to the plaintiff and allocator to be paid before extraction of certificate of costs.

**Postscript**

**[53]** To put this judgment in its proper perspective, I wish to state that the plaintiff is only appealing against that part of the judgment that states that the plaintiff shall not execute on the sum of USD 2.56 million (which is the amount of guarantee from EXIM Bank to the plaintiff) until after the plaintiff has exhausted its legal remedies against EXIM Bank unless limitation would set in for the enforcement of this judgment against the defendants. As for the defendants, they are not appealing against the judgment at all. The background of the banking facilities granted had been set out to provide the context for the judgment given by the court.